In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1515

ERNEST A. SCHAEF AND JOHN KEMP MCCARTHY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that they were entrapped as a matter of law, (2) that they should have been permitted to present the defense of entrapment to the jury with appropriate instructions, and (3) that persons between the ages of 18 and 20 were improperly excluded from the grand and petit juries. Petitioner McCarthy also contends that the evidence was insufficient to support his conviction.

After a jury trial in the United States District Court for the Central District of California, petitioners were convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. Petitioner Schaef was also convicted on one count of possessing cocaine with intent to distribute and on four counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner

McCarthy was also convicted of distributing cocaine, in violation of 21 U.S.C. 841(a)(1).[1] Petitioner McCarthy was sentenced to a 10-year prison term, and petitioner Schaef was sentenced to a 20-year prison term. The court of appeals affirmed on November 27, 1973 (Pet. App. A). A petition for rehearing was denied on January 14, 1974 (Pet. App. B). The petition for a writ of certiorari was not filed until April 10, 1974, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

On July 10, 1971, Agent Sternaman of the Bureau of Narcotics and Dangerous Drugs met with petitioner McCarthy at the Hollywood-La Brea Motel in Hollywood, California, to negotiate the purchase of cocaine. Sternaman was accompanied by Jimmy Johnson, a government informant who had arranged the meeting. Sternaman and McCarthy made a deal for two ounces of cocaine at $700 an ounce and another ounce of cocaine for $400. McCarthy then said he would call petitioner Schaef and place the order (Tr. 84-85). After speaking with Schaef, McCarthy told Sternaman that he was to meet Schaef at the Chalet Gourmet, a restaurant in the area (Tr. 86). McCarthy told Sternaman he could be reached at the Hollywood-La Brea Motel for future purchases of narcotics.

Sternaman and Johnson then met Schaef in front of the Chalet Gourmet. Schaef instructed them to drive back to the motel (Tr. 87). In the car they discussed the price and amounts of future purchases of cocaine. When they arrived back at the motel, they found that McCarthy had

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[1]Co-defendant Fernimen was convicted of conspiring to distribute cocaine, distributing cocaine, and possessing cocaine with intent to distribute.

left and that they could not test the cocaine at his motel room. After driving around for a few minutes, Schaef handed Sternaman three packages of cocaine, for which Sternaman paid him $1,800.

On July 20, 1971, Sternaman and Schaef negotiated a deal for eight ounces of cocaine at $650 an ounce. On July 21, Schaef sold Sternaman 10 ounces of cocaine for $6,500 (Tr. 96-97, 107). Schaef told Sternaman that he could also supply him with China white heroin. After receiving the money, Schaef remarked that he was going to pay his man. Schaef then left and, after stopping briefly at an apartment, drove to co-defendant Fernimen's residence (Tr. 107, 279).

Schaef called Sternaman on July 26, 1971, and told him that the price for future purchases of heroin would be $600 an ounce. On July 27, Schaef called Sternaman and told him that he had been unable to obtain any heroin but that he could provide him with all the cocaine he needed (Tr. 100-101).

Sternaman and Schaef thereafter met several times to discuss future purchases of cocaine (Tr. 204, 207, 106-107, 110-111). At one of these meetings, Schaef gave Sternaman a small sample of cocaine (Tr. 109). Schaef also told Sternaman that he had been involved in narcotics dealings for the past two and one-half years (Tr. 207).

On August 6, 1971, Schaef called Sternaman and told him that he had 42 ounces of cocaine to sell. They met later that afternoon and Schaef gave Sternaman a one-ounce sample (Tr. 112-113). After a number of calls between the two over a three-day period, during which Schaef was staying at co-defendant Fernimen's residence, Schaef indicated he had accumulated 41 ounces of

cocaine to sell. He made arrangements to meet Sternaman at a restaurant on August 9, 1971. On that date, Schaef left Fernimen's residence carrying a yellow suitcase, which he placed in his car. He then drove to the restaurant (Tr. 322). In the parking lot of the restaurant, Schaef sold Sternaman 35 ounces of cocaine for $17,500. The cocaine had been in the yellow suitcase. After he gave Sternaman the cocaine, Schaef was arrested (Tr. 209, 213).

A search of co-defendant Fernimen's residence was then made pursuant to a warrant. The officers found a scale used in weighing and packaging narcotics, a stimulant prescription drug used to cut cocaine, 12 ounces of cocaine in the freezer, and some money used by Agent Sternaman to make an earlier narcotics purchase (Tr. 216, 218, 223, 356).

1. Petitioners' contention that they were entrapped is not supported by the record. The evidence warranted neither a finding of entrapment as a matter of law nor an instruction on entrapment by the trial court.

As this Court recently held in *United States* v. *Russell,* 411 U.S. 423, entrapment focuses on the predisposition of the defendant to commit the criminal act. Here, petitioner Schaef presented no evidence that he did not have a willing predisposition to sell narcotics.[2] In the two smaller sales of cocaine to Agent Sternaman on July 10 and 21, the evidence showed that the informant Johnson only provided the opportunity for petitioner Schaef to make the sale. That does not constitute entrapment. In the last sale, which was

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[2]Schaef testified that, because of his wife's medical problems, he needed money and could not turn down the opportunity to sell cocaine that informant Johnson offered him (Tr. 1050-1054).

consummated on August 9, 1971, the informant Johnson was no longer involved and the sale was arranged completely by Schaef. McCarthy submitted no evidence at all to establish a defense of entrapment. In these circumstances, no instruction on entrapment was required. See *United States* v. *Sanchez*, 440 F. 2d 649, 650 (C.A. 9); *United States* v. *Nieves*, 451 F. 2d 836, 837-838 (C.A. 2); *United States* v. *Aloisio*, 440 F. 2d 705, 711 (C.A. 7), certiorari denied, 404 U. S. 824; *United States* v. *Sullivan*, 443 F. 2d 813, 816 (C.A. 5), certiorari denied, 404 U.S. 861.[3]

2. Petitioner McCarthy contends (Pet. 69-73) that the evidence was insufficient to support his convictions, because it did not show that he possessed the narcotics. But McCarthy was not charged with possessing narcotics. He was charged and convicted of distributing the drugs and of conspiring to distribute them, charges which were amply supported by the evidence showing that he had arranged for the original sale of cocaine by petitioner Schaef to Agent Sternaman. The cases cited by McCarthy, relating to the proof required when

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[3]There is thus no need to consider whether, as petitioners argue, they should be permitted to claim that they were entrapped into committing the acts alleged in the indictment and simultaneously to deny that they committed those acts. We note, however, that the general view is contrary to petitioners' contention. See, *e.g.*, *United States* v. *Hendricks*, 456 F. 2d 167, 169 (C.A. 9); *United States* v. *Rodriques*, 433 F. 2d 760, 761 (C.A. 1), certiorari denied, 401 U.S. 943; *United States* v. *Kilpatrick*, 477 F. 2d 357, 359 (C.A. 6); *United States* v. *Gibson*, 446 F. 2d 719, 722 (C.A. 10). But see *Handford* v. *United States*, 303 F. 2d 219 (C.A.D.C.); *United States* v. *Groessel*, 440 F. 2d 602, 605 (C.A. 5), certiorari denied, 403 U.S. 933.

possession is an essential element of the offense are thus inapposite.[4]

3. Petitioners argue (Pet. 74-95) that the improper exclusion of persons between the ages of 18 and 20 years from the grand and petit juries deprived petitioners of equal protection of the laws. At the time of the indictment and trial, 28 U.S.C. 1865(b)(1) included as a qualification for federal jury service that the juror be at least 21 years old.[5] The constitutionality of that age requirement has been consistently upheld. See *United States* v. *Tantash*, 409 F. 2d 227, 228 (C.A. 9), certiorari denied, 395 U.S. 968; *United States* v. *Gast*, 457 F. 2d 141, 143 (C.A. 7), certiorari denied, 406 U.S. 969. Persons 18 through 20 are not an identifiable racial, ethnic, or similar group, whose exclusion renders a jury nonrepresentative of the community. *United States* v. *Olson*, 473 F. 2d 686, 688 (C.A. 8), certiorari denied, 412 U.S. 905. It is neither arbitrary nor unreasonable

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[4]Distribution of narcotics does not require possession. As the district court correctly instructed the jury, "[t]he term 'distribute' * * * means actually *or constructively* to transfer a quantity of cocaine" (Tr. 1494; emphasis added). Moreover, there was ample evidence to support a finding by the jury, consistent with the district court's instructions (Tr. 1462-1463), that McCarthy aided and abetted the distribution of the cocaine. He could therefore be found guilty as a principal even if he did not personally transfer the cocaine (18 U.S.C. 2).

[5]The statute was amended in 1972 to lower the age qualification to 18 years (P.L. 92-269, 86 Stat. 117).

for Congress to set the age qualification for jury service at 21. Nor does it matter that 18 year olds are entitled to vote in federal elections. "[T]here is no support in law or logic for the proposition that the right of jury service is a concomitant subsidiary of the franchise." *United States* v. *Olson, supra,* 473 F. 2d at 687, 688. See also *United States* v. *Duncan,* 456 F. 2d 1401, 1404-1405 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.